

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHARLES FOX,)	
Plaintiff,)	
)	
v.)	C.A. No. 05-40106-WGY
)	
HARLEY LAPPIN, et al.,)	
Defendants)	
)	

MEMORANDUM OF AMICUS CURIAE

This Court has found Mr. Fox’s complaint to be in the nature of a civil action rather than a habeas petition. While the statutorily mandated restrictions of the Prison Litigation Reform Act, including the requirement of exhaustion of administrative remedies prior to the institution of an action, do not apply to habeas petitions (see, e.g., *Kane v. Winn*, 319 F.Supp.2d 162, 213,n.84 (D.Mass. 2004)), they do apply to civil actions in the nature of a declaratory judgment. Based on this Court’s classification of Mr. Fox’s complaint, amicus must agree with defendants that exhaustion of administrative remedies prior to the filing of the action was statutorily required; that the plaintiff has not yet exhausted his administrative remedies; and that, in the ordinary course, dismissal for failure to exhaust administrative remedies would be required.

However, in *Kane, supra*, at 226, this Court “reserve[d] for another day the question whether a prisoner’s action may simultaneously be treated as an ordinary civil action for one purpose and as a habeas petition for another.”. If the Court chooses to do so here, Amicus suggests that the action could be stayed pending either exhaustion or the passage of the time within which the BOP is required to respond to Mr. Fox’s efforts to exhaust his administrative

remedies.

Respectfully submitted,

/s/ Judith H. Mizner

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Dated: September 6, 2005

CERTIFICATE OF SERVICE

I, Judith H. Mizner, hereby certify that I have, this date, served this Notice by mailing a copy thereof to the following: Mr. Charles M. Fox, Reg. No. 02972-088, FMC Devens, P.O. Box 879, Ayer, MA 01432; Mr. David Winn, Warden, FMC Devens, P.O. Box 880, Ayer, MA 01432; Mr. Harley Lappin, Director BOP, 320 N.W. First Street, Washington, D.C. 20534; and by delivering a copy thereof to Gregg Shapiro, Esq., Office of the United States Attorney for the District of Massachusetts, U.S. Moakley Courthouse, 1 Courthouse Way, Boston, MA 02210.

/s/Judith H. Mizner
Judith H. Mizner